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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 648

J. B. BEARD, *Appellant*,

v.

ELVIS J. STAHR, JR., Secretary of the Army; STEPHEN AILES, Under Secretary of the Army; and Major General JOE C. LAMBERT, The Adjutant General of the Army

Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion of the three-judge District Court upholding the constitutionality of 10 U.S.C. §§ 3791-3797 has not yet been reported. A copy thereof is attached as Appendix A (*infra*, pp. A1-A18).

JURISDICTION

1. This was an action seeking a preliminary injunction to restrain the enforcement and execution of 10 U.S.C. §§ 3791-3797 on the ground of repugnancy to the Constitution of the United States, viz., denial of procedural due process.

2. On December 19, 1961, the three-judge District Court entered an order (Appendix B, *infra*, page A19) granting appellees' motion for summary judgment, denying appellant's motion for summary judgment, denying appellant's motion for preliminary injunction, and dismissing appellant's complaint.

The notice of appeal was filed in the District Court on December 20, 1961.

3. The jurisdiction of this Court to review on direct appeal the order of the three-judge District Court denying appellant's motion for a preliminary injunction is conferred by 28 U.S.C. § 1253.

4. The text of the statute of the United States challenged on the ground of repugnancy to the Constitution is set forth in Appendix C (*infra*, pp. A20-A23).

QUESTIONS PRESENTED

1. Whether, as held below, statutory provisions purporting to authorize the administrative elimination of an officer from the Regular Army are unlimited and unrestrained by anything in the Due Process Clause of the Fifth Amendment.

2. Whether the procedural guarantees of the Due Process Clause apply to administrative proceedings to eliminate an officer from the Regular Army, where such proceedings are based on allegations of moral dereliction, shift the burden of proof to him to disprove those allegations, result in a discharge less than honorable and in the

loss of a substantial retirement annuity, and stigmatize him so that he would be demonstrably hindered in obtaining further employment.

3. Whether the provisions of 10 U.S.C. §§ 3791-3797 are unconstitutional in that, both on their face and as applied in this case, they authorize the elimination of an officer of the Regular Army for alleged moral dereliction without providing any means for the witnesses against him to be produced for confrontation and cross-examination.

4. Whether the provisions of 10 U.S.C. §§ 3791-3797 are unconstitutional in that, both on their face and as applied in this case, they shift to the accused officer the burden of disproving the *ex parte* allegations made against him.

STATUTE INVOLVED

The statute involved, 10 U.S.C. §§ 3791-3797, is set forth in Appendix C (*infra*, pp. A20-A23).

STATEMENT

This was an action to restrain appellant's elimination from the Regular Army pursuant to 10 U.S.C. §§ 3791-3797 (*infra*, pp. A20-A23), on the ground that those provisions, both on their face and as applied to him, are unconstitutional, in that they deprive him of his office and of valuable retirement rights thereunto appertaining, without due process of law, in two respects, viz.:

(a) They deny him the right to be confronted by and to cross-examine his accusers; and

(b) They shift to him the burden of disproving *ex parte* allegations made against him, which, when taken as true, would (i) deprive him of his office, (ii) place a stigma upon him, (iii) separate him from the service with a second-class discharge, and (iv) subject him to the loss of retirement rights whose present value over and above severance pay is approximately $92,000.

Simultaneously with the filing of his complaint, appellant moved for a preliminary injunction to restrain the execution and enforcement of the cited statutes, and moved further that a three-judge court be convened. The latter motion was granted, and the case was heard and determined by a district court of three judges, on cross-motions for summary judgment.

The evidence, all of which is documentary, may be summarized as follows:

Appellant is an officer of the Regular Army with the permanent rank of Major and the temporary rank of Lieutenant Colonel, living with his wife and five minor children at his duty station, Fort Monroe, Virginia. He served in the Army in World War II, where he was awarded a Bronze Star Medal for valor in New Guinea. Then, following renewed Army service that began in 1948, he was commissioned in the Regular Army in 1958. At the present time he has had over 19 years of active Federal service, and he will be eligible for retirement in November 1962 upon completion of 20 years. But for the incident about to be described, his military record reflects exemplary conduct and high efficiency ratings.

As set forth by the court below (*infra*, pp. A3-A4):

> "This case had its origin in an episode that took place on September 21, 1960. That morning the plaintiff arrived in Washington, for a two-day official conference at the Pentagon. After the first day's session he took a walk about the city during the early evening. As he was passing the YMCA, he entered the building and went downstairs to the men's room. When he returned to the lobby and was about to leave, a stranger stared at him and made a hardly perceptible nod in the direction of the stairs. The stranger then went down toward the men's room and the plaintiff turned around and followed him. According to the police officer involved in the matter, a conversation ensued between them. It began with an exchange of innocuous remarks and then in rather vulgar phrase-

ology the stranger indicated to the plaintiff that he was looking for a partner for a homosexual act. The plaintiff made a reply that seemed to acquiesce in the stranger's suggestion and also touched the stranger's body through his clothing in an indecent manner. The stranger then identified himself as a police officer, exhibited his badge, and placed the plaintiff under arrest.

"The plaintiff was then taken to Police Headquarters, where he was questioned and at the request of his interrogators wrote on a typewriter his own version of the event. His summary of what took place does not substantially differ from the detective's account, except in its choice of words. In addition, the plaintiff stated that he was not a homosexual, and had no intention of engaging in an unnatural act; that he suspected the stranger of being homosexual and was curious to know how such a person acted and what he said, and for this reason engaged in the conversation. The plaintiff further asserted that he had been on the verge of terminating the encounter and leaving when the stranger took a stand between him and the door and identified himself as a police officer. In a later statement the plaintiff indicated that his curiosity originated in the fact that he had recently handled such cases administratively, although he had never seen any such persons. The plaintiff was not charged at Police Headquarters, but was turned over to the military authorities who questioned him further and then released him to return to duty."

Thereafter, on May 3, 1961, a selection board of general officers convened under 10 U.S.C. § 3791 (*infra*, p. A20) called on appellant to show why he should not be removed from the active list of the Regular Army for the following reasons:

"1. An existence of homosexual tendencies.

"2. Conduct unbecoming an officer."

The selection board based its order to show cause entirely on documents, and did not call or hear any witnesses who

had personal knowledge of the facts on which the foregoing allegations were based. Appellant was not given a hearing by the selection board, and did not and could not appear before that board.

Conduct unbecoming an officer and a gentleman is an offense in violation of Article 133 of the Uniform Code of Military Justice (10 U.S.C. § 933), governed by the two-year statute of limitations of Art. 43(c), UCMJ (10 U.S.C. § 843(c)). Although the incident that was the basis of the elimination proceedings against appellant that are now under review occurred, as has been shown, on September 21, 1960, up to the present time no court-martial charges have been served on appellant.

In respect of the elimination proceedings, appellant had a hearing on July 19 and 20, 1961, before a board of inquiry convened pursuant to 10 U.S.C. § 3792 (*infra*, pp. A20-A21). The recorder of that board called no witnesses, and introduced only documents into evidence. Appellant appeared and testified in his own behalf, and adduced the testimony of numerous witnesses. Appellant also requested the presence of Detective Arscott of the Metropolitan Police of the District of Columbia, the policeman of the incident quoted *supra*, pp. 4-5, whose solicitation to an immoral act, a solicitation admitted by him in writing, was the basis of the allegations made against appellant. This request was refused on the stated ground that Detective Arscott was unavailable and because "This Board has no subpoena power."

The regulations under which the board of inquiry proceeded, Army Regulations (hereinafter simply "AR") 635-105, Personnel Separations, Eliminations, 13 Dec. 1960, provided among other things as follows:

> "The impression that it is the responsibility of the Government to establish its case before this board [of inquiry], in much the same manner as is done in a court-martial, is erroneous. The burden of proof rests

with the respondent to produce convincing evidence that he should be retained. In the absence of such a showing by the respondent, the board must find for elimination." Appendix I, ¶4*a*, p. 19.

• • • • •

"10. Instructions to boards of inquiry on their mission. These instructions will be given by the appointing authority, his designated representative, the president or recorder of the board, or may be formalized in a specific letter of instructions to the board of inquiry. The instructions will include, but need not be limited to, items listed below applicable to the case being considered:

"*a*. Informing the board members that selection of an officer to show cause for retention is a 'prima facie' case for elimination in the absence of convincing evidence advanced by the respondent for further service; and, that the adverse finding of the selection board, standing alone, is sufficient to support elimination.

"*b*. Emphasizing that the burden of proof rests with the respondent to show why he should retain his present status." Appendix I, ¶¶ 10*a*, *b*, p. 24.

Pursuant to the provision last cited, the board of inquiry was duly advised by the recorder thereof that "The burden of proof rests with the respondent to show why he should retain his present status."

Following the hearing, the board of inquiry found as follows:

"1. As to the allegation of existence of homosexual tendencies, that cause for retention has not been shown. This finding is based on the following reason:

"The evidence presented by the respondent has not refuted or rebutted the homosexual tendencies exhibited by the actions which took place in the YMCA, Washington, D. C., on the night of 21 September 1960.

"2. As to the allegation of conduct unbecoming an officer, that cause for retention has not been shown. This finding is based on the following reason:

> "The actions of the respondent in permitting himself to be lured by a complete stranger into a latrine, and in that latrine acting in such a manner as to cause his arrest, are completely incompatible with the conduct expected of an officer."

Accordingly, the board of inquiry recommended "Elimination, and that a General Discharge, under Honorable Conditions, be issued."

On September 19, 1961, the recommendation of the board of inquiry that appellant be eliminated from the service was approved by the Commanding General, Second United States Army, and the proceedings were forwarded to the Department of the Army.

On October 24, 1961, the proceedings of the board of inquiry thus approved were considered by a board of review of three general officers convened pursuant to 10 U.S.C. § 3793 (*infra*, p. A21). Appellant was not present, and under the governing regulations could not be present. The recorder of the board of review introduced the record made before the board of inquiry, advised the board of review that the objections made by appellant's counsel before the board of inquiry were not well taken, and read lengthy excerpts from the Army Regulations governing homosexuals, AR 635-89.

The recorder did not advise the board of review that, at the board of inquiry hearing, the Army medical officer who had examined appellant testified regarding him that "In terms of the statement in the Army Regulations, I cannot say that he is a homosexual." The recorder similarly did not advise the board of review that a civilian doctor testified that appellant was not homosexual, or that five lay witnesses had testified to the same effect.

Following this presentation, the board of review found that appellant "has failed to show cause why he should be retained in the Army," and recommended that he be eliminated and issued a General Discharge—one degree lower than that recommended by the board of inquiry.

The present action was brought on the following day, October 25, 1961, before action on the proceedings had been taken either by the Secretary of the Army, or by his delegate in elimination cases, the Under Secretary of the Army, both of whom were defendants below and are appellees here.

The Army Regulations governing eliminations make no provision for the officer sought to be eliminated either to appeal to or to appear before the Secretary of the Army or his delegate (AR 635-105, *supra*).

The record shows that, in a request addressed to the present Secretary of the Army, an appellee here, by counsel for an officer in a somewhat similar elimination case, the request being that the proceedings be disapproved because of the shift in the burden of proof and because of the denial of confrontation and cross-examination, the present Under Secretary of the Army, also an appellee here, replied on April 4, 1961:

> "If, as you allege, the Army regulations which prescribe procedures for elimination of substandard officers are inconsistent with the statutes which they are designed to implement, and if, as you also allege, these statutes are unconstitutional as applied to your client, considerable revision of Army elimination procedures will be required. On the basis of the information available to me, and my examination of the briefs filed in the pending litigation, I do not believe that such a revision is necessary or desirable at this time."

Following the filing of the complaint, the District Court (McGarraghy, J.), after a hearing in chambers at which the appellees were represented by counsel, signed a tem-

porary restraining order on the afternoon of October 25, 1961, that restrained the appellees "from taking any steps looking to the removal of the [appellant] from the active list of the Regular Army pursuant to or by reason of anything appearing in the elimination proceedings commenced against him on May 3, 1961."

That order by its terms permitted the Secretary or his delegate to disapprove those proceedings. On the following morning, however, counsel for the Secretary and his co-defendants sought a modification of the order to permit the Secretary to approve the elimination proceedings. Judge McGarraghy denied the motion, with the comment, "The order is in accordance with my intentions."

On November 2, 1961, following the oral granting of the motion to convene a three-judge court, appellant sought an extension of the temporary restraining order, which on that day had expired by its terms. Over objection by counsel for the Secretary, the District Court (Holtzoff, J.) extended the restraining order for the 10-day period allowed by Rule 65(b), F.R. Civ.P.

Inasmuch as the three-judge court was not scheduled to convene until after the expiration of that period, appellant applied to Circuit Judge Bastian, who by then had been designated as the senior member of the three-judge court, for a further stay, to preserve the jurisdiction of that court by preventing any act by the Secretary that would render the case moot. Again counsel for the Secretary sought an order that would permit that officer to approve the elimination proceedings. Judge Bastian, however, entered a new stay in the terms originally framed, to remain in effect until the three-judge court heard and disposed of appellant's motion for preliminary injunction.

The record shows that, although the Army changed appellant's duties after the elimination proceedings now in

question were commenced, he was continued on duty, and he is still on duty as of this time.

If appellant is eliminated from the Army prior to November 4, 1962, he will not have sufficient service to qualify for retirement, and hence will be given $8940 by way of severance pay pursuant to 10 U.S.C. § 3796 (*infra*, pp. A22-A23). If, however, he continues on the active list through the date mentioned, he will be eligible to retire in the grade of lieutenant colonel and to receive retirement pay at the rate of $4650 per year.[1]

The present value of an annuity of $4650 per annum for a man of appellant's age by November 1962 is approximately $100,000, so that, if appellant is eliminated, he would stand to lose the difference between the value of his retirement annuity and his severance pay, or some $92,000.[2]

After hearing the parties' cross-motions for summary judgment, the three judge court ordered appellant's complaint dismissed, holding, in an opinion written by Judge Holtzoff (*infra*, pp. A1-A18), that in enacting the challenged elimination statute, Congress was not limited either by the Due Process Clause, the Bill of Rights, or by any other provision of the Constitution.

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[1] As of November 4, 1961, appellant had 19 years of active Federal service, but, for pay purposes, which includes inactive duty as well, see 37 U.S.C. § 233, he had 21 years, 1 month, and 24 days of service. Therefore his present base pay, see 37 U.S.C. § 232(a), is $745 a month; and his severance pay would be 12 times that amount.

By November 4, 1962, appellant will have had over 22 years' service for pay purposes, and will be entitled to retire in the grade of lieutenant colonel, with retired pay of $387.50 per month or $4,650 per year. See 10 U.S.C. §§ 3911, 3963(a).

[2] Appellant was born on May 29, 1921, and hence will be 41 years old when he reaches November 4, 1962, his retirement eligibility date. The present value of his retirement annuity would therefore be a matter of computation (see *City of Lincoln* v. *Power*, 151 U.S. 436, 441, mortality tables may be judicially noted), although it also appears in the record.

The order dismissing the bill of complaint was entered on December 19, 1961, and, over objection by counsel for the Secretary, appellant was granted a 10-day stay of his discharge, conditioned on the filing, within that period, of a notice of appeal and of an application to the Circuit Justice for a stay of his discharge pending the disposition of appellant's appeal. Both documents were duly filed on the following day, December 20.

The latter application had not been acted on when the present document went to press.

THE QUESTIONS ARE SUBSTANTIAL

The holding of the court below, that the statutory elimination process now being challenged "is not subject to the limitations of the due process clause" (*infra*, p. A13), and that "Dismissals of officers are not limited or controlled by the Bill of Rights" (*infra*, p. A13), places the decision under appeal on a constitutional ground that is at once the broadest possible—and also the least tenable.

No decision is cited for those propositions, and none, so far as known, is available. (It is due counsel for the appellees below to point out that they did not urge the foregoing views upon the District Court.)[3] For whatever may be the power of the President, as Commander-in-Chief, to separate officers from the armed forces in the absence of statutory restraints, for any reason or for none at all; whatever may be the power of Congress to direct the President in the matter of qualifications for appointment or selection (cf. 30 Op. Atty. Gen. 177); here the question concerns the validity, in respect of procedural due process, of

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[3] "A reading of the elimination statutes • • • readily discloses that the method provided for elimination of army officers by the Congress is, on its face, fair and reasonable *and as such affords constitutional procedural safeguards.*" Memo. of Points and Authorities • • • in Support of Defendants' Motion to Dismiss, p. 5 (italics added).

an Act of Congress purporting to confer the power of separation, not on the President, but on the Secretary of the Army (or, as in actual practice here, on his delegate, the Under Secretary), for specified grounds and under a procedure prescribed in detail.

Therefore the holding below amounts to this, that an officer facing elimination from the Regular Army because of alleged moral dereliction, a step that will cost him his livelihood and a valuable retirement annuity as well, that will stigmatize him, and that will sharply curtail his future employment possibilities (see *Bland* v. *Connally*, 293 F. 2d 852 (D.C. Cir.), at 853 note 1, and 858 notes 9 and 10), is not entitled in the course of the elimination process to the minimal protection of procedural due process of law.

The present action does not ask the courts to assume "the task of running the Army" (*Orloff* v. *Willoughby*, 345 U.S. 83, 93), or to substitute their judgment for those of the military authorities in respect of appellant's fitness to retain his commission; indeed, the complaint does not so much as request an evaluation of the sufficiency of the evidence. All that it asserts is that a statute purporting to authorize an officer's elimination must be weighed in the balance of the Due Process Clause, and that, so tested, the statute now challenged has been found wanting.

The Court of Military Appeals, which early held that the soldier's protections were statutory rather than constitutional (*United States* v. *Clay*, 1 USCMA 74, 77, 1 CMR 74, 77), has insisted that, except for the right to presentment by grand jury and to trial by petit jury, an individual in the military service has every right and privilege guaranteed to any citizen by the Constitution (*United States* v. *Burney*, 6 USCMA 776, 796, 803, 21 CMR 98, 118, 125). But the court below holds that, once a citizen is commissioned as an officer, he is *caput lupinum* in respect of procedural fairness.

That holding alone, it is submitted, requires the noting of probable jurisdiction of the present appeal. But the narrower questions now presented are also substantial.[4]

First. Appellant's insistence on a right to confrontation by and cross-examination of the only other participant in the incident on which his proposed elimination is based is not in any sense a matter of formality or of the *elegantia juris.*

Two persons were present, appellant and Detective Arscott, and the basic question is whether appellant was guilty of conduct marking him unfit thereafter to associate with honorable men, or whether what he did was simply an unfortunate lapse, an ill-advised yielding to curiosity.[5]

As has been seen, the board of inquiry, having only appellant before it, regarded adversely his "actions • • • in permitting himself to be lured by a complete stranger."

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[4] *Ledford* v. *Curran*, motion for leave to file petition for mandamus denied, 366 U.S. 948, is not *contra* on the need for a three-judge court in the present case. There the petitioner was sought to be eliminated for misconduct under a statute that reached only inefficiency; here the elimination proceeding falls squarely within the challenged statute—which was enacted in 1960, during the pendency of the earlier litigation (and no doubt in response thereto). Accordingly, while Judge Curran denied the motion to convene a three-judge court in the earlier case, Judge Holtzoff granted such a motion here—and it was the three-judge court that entered the judgment now being appealed.

[5] "The fitness therefore of the accused to hold a commission in the army, as discovered by the nature of the behaviour complained of, or rather his worthiness, morally, to remain in it after and in view of such behaviour, is perhaps the most reliable test of his amenability to trial and punishment under this Article." Winthrop, *Military Law & Precedents* (2d ed. 1896) •1106 (1920 reprint, pp. 712-713), commentary on AW 61 of 1874, Conduct Unbecoming an Officer and a Gentleman, the current version of which is Art. 133, UCMJ (10 U.S.C. § 933).

Articles of War will hereafter be referred to simply as "AW."

How can such conduct be judged without seeing the decoy? For the rationale of confrontation is that, by producing the witness, the tribunal can "judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U.S. 237, 242-243. It is significant that, in the present area, the District of Columbia Circuit has commented disapprovingly on the use of police decoys (*Guarro* v. *United States*, 237 F. 2d 578, 582), and has imposed a rigid rule of corroboration (*Kelly* v. *United States*, 194 F. 2d 150). (For more of Detective Arscott's apparently routine activities, reference may be made to the opinion of the D. C. Municipal Court of Appeals in *Rittenour* v. *District of Columbia*, 163 A. 2d 558.)

The right to confrontation and cross-examination, it had been supposed, was settled by this Court in *Greene* v. *McElroy*, 360 U.S. 474, 496-497:

> "We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative and regulatory actions were under scrutiny. * * *" [Citations and footnotes omitted.]

And, unlike *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, here appellant's loss of livelihood was involved.

Moreover, in *Bland* v. *Connally*, 293 F. 2d 852, and *Davis* v. *Stahr*, 293 F. 2d 860, the District of Columbia Circuit held applicable to military cases the confrontation-and-cross-examination principles of *Greene* v. *McElroy*, in situations where, as here, the discharges in question were less than honorable, and the accusations involved a stigma.

The basic proposition that the complaint in this case advanced therefore appeared to be settled.

The court below, however, distinguished the *Bland* and *Davis* cases on the ground that they concerned merely inactive reservists. But that circumstance, far from weakening those decisions, makes the present an *a fortiori* case. Reserve officers, who below general or flag officer rank are appointed by the President alone (10 U.S.C. § 593(a)), may be discharged at the pleasure of the President (10 U.S.C. §§ 593(b), 1162(a)), or, where such separation is under conditions other than honorable, pursuant to a far simpler procedure (10 U.S.C. § 1163(c)). Regulars, therefore, have far more statutory protection in respect of their military status than Reservists—from which the court below deduced that they have fewer constitutional rights! Such a curious calculus of constitutional values plainly qualifies as a substantial question.[6]

Second. Here, as the legislative history indicates, the elimination statute itself was designed to shift the burden

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[6] In order not to lengthen this Jurisdictional Statement unduly, two subsidiary contentions under the present heading may be briefly mentioned in the margin:

(a) *Williams* v. *Zuckert*, D.C. Cir., No. 16345, Nov. 9, 1961, relied on by the court below (*infra*, page A17), does not support its holding. There (p. 3, slip opinion) the appellant "failed to use available administrative means to arrange for the appearance of witnesses as provided by the Civil Service Commission Regulations." Here, admittedly, no means to arrange for Arscott's appearance, administrative or otherwise, were available.

(b) *Cleary* v. *Weeks*, 259 U.S. 336, was very different, since under the statute there involved the officer concerned could appear before a *court* of inquiry (10 U.S.C. [1926-1940 eds.] § 571), a tribunal which had the same power to summon witnesses as a court-martial (AW 101 of 1916-1948, 10 U.S.C. [1926-1946 eds.] § 1573), viz., the nation-wide subpoena powers of United States courts in criminal cases (AW 22, 10 U.S.C. [1926-1946 eds.] § 1493).

of disproof to the accused officer. As Committee counsel frankly said (*Hearings before Subcommittee No. 1, House Committee on Armed Services, on S. 1795, 86th Cong., 1st sess.*, p. 3802):

> "Apparently when you take a case to Federal court today the individual is always right. In other words, the problem is with the Army being on the defensive, for the failure of the language to be completely clear as to what was intended. I think with all this discussion that we have here on the record now, it must be mighty clear that the subcommittee means that the individual officer—make sure we get this down—means that the individual officer has the burden of establishing that he should be retained and if he fails to establish that he should be retained, and if his removal is recommended to the Secretary of the Army, that the Secretary of the Army may take action on the basis of that recommendation. That is what is intended."

The report of the House Committee shows that it adopted in all respects the views of its counsel (H.R. Rep. 1406, 86th Cong., 2d sess., pp. 12, 13, 14).[7]

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[7] "The principal difficulties experienced in administering the present law are the following:

"(1) The burden of proof required to effect an officer's removal. While the law technically requires the officer to 'show cause' why he should not be removed, the actual burden of justifying the officer's removal is imposed on the services.

* * * * * *

"In order to resolve these difficulties, the committee recommends that the present chapters 359 and 859 be revised. These chapters, as revised, will refer only to elimination for substandard performance of duty. The following major changes have been made in these chapters.

"(1) Sections 3781, 3782, 3783 (the Army sections) and sections 8781, 8782, 8783 (the Air Force sections) have been amended to clearly establish that an officer who has been identified by a screen-

The foregoing Congressional intent to shift the burden of proof to the accused officer was implemented by the Army Regulations quoted *supra*, pp. 6-7, and by the advice specifically given the board of inquiry by its recorder (*supra*, p. 7).

Having regard to the fact that the elimination process established by the challenged statute has four stages, three of which are *ex parte*, with the burden of disproof placed on the accused at the only stage that is not *ex parte* and where alone he is permitted to be heard, it is plain that a scheme better calculated to make accusation do service for proof could hardly be devised. Accordingly, the statutory scheme now being challenged is so palpably unfair as to deny procedural due process.

The fact that the statute established "an administrative machinery" (*infra*, p. A16) does not make it any less vicious in respect of its fundamental unfairness. What is sought

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ing board as one whose performance of duty is substandard, must assume the burden of establishing that he should be retained.

* * * * *

"These chapters will be utilized for Army and Air Force officers whose performance of duty is substandard.

"The proposed new chapters 360 and 860 will provide for the Army and Air Force, respectively, the authority to remove officers for moral or professional dereliction, or for security reasons. The procedures for removal are similar to those proposed in the case of officers being eliminated for substandard performance of duty. However, in view of the nature of the reasons for which removal is authorized by these chapters, the provisions differ in the following respects:

* * * * *

"(2) With respect to officers who are being eliminated and who are not qualified for retirement, they may be 'discharged' rather than 'honorably discharged' as is provided in the case of officers being eliminated for substandard performance of duty."

In view of this Committee report, appellant abandons as untenable the non-constitutional ground set forth in par. III(5) of his Notice of Appeal.

to be accomplished here is a change of status to the detriment of the individual concerned. Since, therefore, the burden of proof cannot be shifted to aliens resisting deportation (*Kwong Hai Chew* v. *Rogers*, 257 F. 2d 606 (D.C. Cir.); *Wood* v. *Hoy*, 266 F. 2d 825 (C.A. 9th), it may not be shifted to a citizen defending his title to, and the substantial emoluments of, an office conferred by the President with the advice and consent of the Senate.

Here again, the present case raises a substantial constitutional question of basic fairness.[8]

Third. The second allegation against appellant was "Conduct unbecoming an officer." This has been a military offense in the American Army ever since the beginning. AW XLVII of 1775; Sec. XIV, Art. 21, of 1776; AW 20 of 1786; AW 83 of 1806, all set forth in Winthrop, *supra*, 1920 reprint, at pp. 957, 969, 974 and 983, respectively; AW 61 of 1874, in R.S. § 1342; AW 95 of 1916 1948 (10 U.S.C. [1926 1946 eds.] § 1567); Art. 133, UCMJ (10 U.S.C. § 933).

But—under Art. 51(c)(4) of the Uniform Code of Military Justice (10 U.S.C. § 851(c)(4)), as everywhere else in American law, the burden of proof is on the prosecution. Moreover, pursuant to Art. 46, UCMJ (10 U.S.C. § 846) and par. 115 of the presidentially-prescribed *Manual for Courts-Martial, U. S., 1951*, an accused is entitled to compulsory process for witnesses. Finally, the Uniform Code renders every conviction by court-martial reviewable by a civilian tribunal, the United States Court of Military Appeals. Art. 67, UCMJ (10 U.S.C. § 867).

The obvious surmise, that it was the existence of those provisions which militated against appellant's being haled

[8] The elimination procedure considered in *Cleary* v. *Weeks*, 259 U.S. 336, and in *Rogers* v. *United States*, 270 U.S. 154, did not shift the burden to the officer concerned; there the court of inquiry was required to find as a fact whether or not the adverse allegations had been established (AR 605-200, Feb. 6, 1935, par. 3c).

before a court-martial, does not rest on innuendo, for that much was boldly asserted during the course of the Subcommittee's consideration of the statute now under scrutiny. See *Hearings*, *supra*, at p. 3816:

> "A lot of these moral dereliction cases in a court-martial, where you have to have more than a preponderance of the evidence to convict, are very difficult, and so they will use a board proceeding here and charge them with moral dereliction even though they may not be able to establish overt acts."

In a somewhat similar case, the Court of Claims held invalid resort to such administrative procedure to give a female airman a discharge "under conditions other than honorable" where court-martial procedures were available but not used. *Clackum* v. *United States*, No. 246-56, decided January 20, 1960, but not yet reported.[9]

Fourth. Lest any effort be made here to support the result below on procedural grounds, a few words on that score will be added now, with a view to avoiding the need for any reply brief under Rule 16(3).

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[9] There the Court of Claims said (p. 4 of slip opinion):

"The Government defends this remarkable arrangement, and its operation in the instant case, on the ground that it is necessary in the interest of an efficient military establishment for our national defense. We see nothing in this argument. The plaintiff being a member of the Air Force Reserve, on active duty, the Air Force had the undoubted right to discharge her whenever it pleased, for any reason or for no reason, and by so doing preserve the Air Force from even the slightest suspicion of harboring undesirable characters. But it is unthinkable that it should have the raw power, without respect for even the most elementary notions of due process of law, to load her down with penalties. It is late in the day to argue that everything that the executives of the armed forces do in connection with the discharge of soldiers is beyond the reach of judicial scrutiny. *Harmon* v. *Brucker*, 355 U.S. 579."

Appellant here, being an officer of the Regular Army, of course cannot be discharged at will.

1. Appellant's action, filed before the Secretary acted, was not premature for that reason.

As has been seen (*supra*, p. 9), the regulations did not provide for any appeal to the Secretary. There being no administrative remedy, "There was thus nothing to exhaust." *City of Miami* v. *Parmons*, 288 F. 2d 465 (C.A. 5). Moreover, since the validity of the statute is being assailed, a matter not curable by the Secretary, the doctrine of exhaustion of remedies would be inapplicable in any event. Cf. *Leedom* v. *Kyne*, 358 U.S. 184.

Further, since the very officials concerned had previously expressed their approval of precisely those features of the elimination process being attacked here (*supra*, p. 9), there was, very plainly, no need once more to appeal to them; the law does not require the doing of a useless act. *Tacey* v. *Irwin*, 18 Wall. 549, 551; *Sims* v. *Everhardt*, 102 U.S. 300, 310.

Additionally, since the Secretary has been shown determined to approve the present proceedings, appellant was not required to await, with a species of split-second timing, the precise moment between the making and the effectuation of the Secretary's decision as the only occasion when the courts would be open to him for redress. A litigant is not obliged, at his peril, to apply for equitable relief just midway between the Scylla of prematurity and the Charybdis of mootness. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24, 34; *Benson* v. *Schofield*, 236 F. 2d 719, 721 (D.C. Cir.), certiorari denied, 352 U.S. 976; *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770, 776-777 (D.D.C.), affirmed, 278 F. 2d 871 (D.C. Cir.). An injunction, after all, looks to the future. *Swift & Co.* v. *United States*, 276 U.S. 311, 326.

2. Nor is appellant's failure to resort to the Army Board for the Correction of Records any bar, as indeed the District of Columbia Circuit has just held. *Oaden* v. *Zuckert*, No. 16283, Dec. 14, 1961. The Fourth Circuit,

true, held the contrary in *Reed* v. *Franke*, No. 8270, Nov. 7, 1961, but it is not necessary to resolve that conflict of circuits here, for this reason: The power of altering a military record "to correct an error or remove an injustice" is, ultimately, vested in the Secretary himself by the statute, 10 U.S.C. § 1552. But here it is the very same Secretary who will have approved appellant's elimination. Thus the appeal would be, not from Philip drunk to Philip sober, but from Philip drunk to Philip still besotted. That being so, no rule of law required this appellant, as a condition precedent to invoking what Mr. Justice Baldwin in *Bonaparte* v. *Camden & A. R. Co.*, Baldw. 205, 218, Fed. Case No. 1617, 3 Fed. Cas. at 827 (C.C.D.N.J.), called the "protecting preventive process of injunction," to go through the futile motions of requesting the present Secretary to change his mind.

3. It was argued below on the Secretary's behalf that appellant had an adequate remedy at law by way of an action for a declaratory judgment, and that, if appellant were ultimately successful, the Secretary then could and would restore appellant to the rolls. But unlike the situation of civilian employees, who can be so restored with back pay, such a step in the case of a Regular Army officer like appellant would be beyond even the President's power under a long line of decisions and rulings. *McElrath* v. *United States*, 102 U.S. 426; *United States* v. *Corson*, 114 U.S. 621; *Mimmack* v. *United States*, 97 U.S. 426; 17 Op. Atty. Gen. 297; 18 Op. Atty. Gen. 18; Winthrop, *supra*, 1920 reprint, pp. 747-754. Moreover, no decision now on the books even remotely suggests that a court of the United States can order the Secretary of a Military Department to do what under the Constitution requires Presidential appointment and Senatorial confirmation pursuant to appropriate authorizing legislation, viz., to place on the roll of officers of the Regular Army an individual who by reason of his elimination therefrom has become a civilian.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction of this appeal should be noted.

FREDERICK BERNAYS WIENER,
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Washington 6, D. C.,
Counsel for the Appellant.

JANUARY 1962.

APPENDIX

APPENDIX A

OPINION BELOW

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3528-61

J. B. BEARD, *Plaintiff*,

v.

ELVIS J. STAHR, JR., Secretary of the Army,
STEPHEN AILES, Under Secretary of the Army, and
MAJOR GENERAL JOE C. LAMBERT, The Adjutant General,
United States Army, *Defendants*.

Opinion

rederick Bernays Wiener, of Washington, D. C., for the laintiff.

David C. Acheson, United States Attorney; Joseph M. Hannon and Harold D. Rhynedance, Jr., Assistant United States Attorneys; all of Washington, D. C., for the defendants

Before BASTIAN, Circuit Judge, and PINE and HOLTZOFF, District Judges.

HOLTZOFF, D.J.—This is an action brought by an officer of the regular Army against the Secretary of the Army, the Under Secretary and the Adjutant General, to enjoin them from removing him from the active list pursuant to elimination proceedings conducted under 10 U.S.C. §§ 3781 *et seq.*, which established a procedure for dismissing officers of the regular Army on certain specified grounds. It is contended in behalf of the plaintiff that the statute is unconstitutional, and accordingly this three-judge court was convened. The attack on the statute is based on the claim that it is violative of due process of law under the Fifth Amendment in that it places the burden of proof on the officer to show cause for his retention on the active list;

and in that it fails to require that he be confronted with witnesses against him. The matter is now before the Court on the plaintiff's motion for a preliminary injunction, and on cross-motions for summary judgment. We hold that the statute is valid.

The statute, 10 U.S.C. § 3781 to § 3797, became law on August 10, 1956, 70A Stat. 218, and was amended and expanded by the Act of July 12, 1960, 74 Stat. 386. In brief, it authorizes the Secretary of the Army to convene a board of officers at any time to review the record of any commissioned officer on the active list of the regular Army, in order to determine whether he should be required to show cause for his retention on the active list because his performance of duty had fallen below the standards prescribed by the Secretary, or because of moral or professional dereliction, or because his retention would not be clearly consistent with the interests of national defense. It is provided further that Boards of Inquiry, composed of three or more officers, shall be convened to receive evidence and make findings and recommendations whether such an officer should be retained on the active list of the regular Army. The statute expressly requires the board to give the officer a fair and impartial hearing. If the Board of Inquiry determines that the officer has failed to establish that he should be retained on the active list, it is required to send the record of its proceedings to a Board of Review. The Secretary of the Army is authorized to convene Boards of Review, each composed of three or more officers, to review the records of officers recommended by Boards of Inquiry for removal from active service. If such a Board determines that the officer has failed to establish that he should be retained on the active list, it transmits its recommendation to the Secretary, who in that event is authorized to remove the officer from active service. The Secretary's action is final and conclusive. Admittedly this statute has been construed as placing upon the officer the burden of proving that he should be retained in the service.

It must be emphasized that the statute is not intended to provide a judicial trial or even a quasi-judicial hearing on specific charges. It merely prescribes an administrative routine for the elimination of officers who are deemed unsuitable.

The present proceeding arose out of the following facts. The plaintiff, J. B. Beard, is a Lieutenant Colonel in the United States Army, in which he has served for about nineteen years, having been inducted as a private and then worked his way up through the ranks. He has had an excellent record, and during World War II he received a Bronze Star Medal for gallantry in action. He is married and lives with his wife and five children. During the pertinent period he was stationed at Fort Monroe, Virginia.

This case had its origin in an episode that took place on September 21, 1960. That morning the plaintiff arrived in Washington, for a two day official conference at the Pentagon. After the first day's session he took a walk about the city during the early evening. As he was passing the YMCA, he entered the building and went downstairs to the men's room. When he returned to the lobby and was about to leave, a stranger stared at him and made a hardly perceptible nod in the direction of the stairs. The stranger then went down toward the men's room and the plaintiff turned around and followed him. According to the police officer involved in the matter, a conversation ensued between them. It began with an exchange of innocuous remarks and then in rather vulgar phraseology the stranger indicated to the plaintiff that he was looking for a partner for a homosexual act. The plaintiff made a reply that seemed to acquiesce in the stranger's suggestion and also touched the stranger's body through his clothing in an indecent manner. The stranger then identified himself as

a police officer, exhibited his badge, and placed the plaintiff under arrest.[1]

The plaintiff was then taken to Police Headquarters, where he was questioned and at the request of his interrogators wrote on a typewriter his own version of the event. His summary of what took place does not substantially differ from the detective's account, except in its choice of words. In addition, the plaintiff stated that he was not a homosexual, and had no intention of engaging in an unnatural act; that he suspected the stranger of being homosexual and was curious to know how such a person acted and what he said, and for this reason engaged in the conversation. The plaintiff further asserted that he had been on the verge of terminating the encounter and leaving when the stranger took a stand between him and the door and identified himself as a police officer. In a later statement the plaintiff indicated that his curiosity originated in the fact that he had recently handled such cases administratively, although he had never seen any such persons. The plaintiff was not charged at Police Headquarters, but was turned over to the military authorities who questioned him further and then released him to return to duty.[2]

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[1] The evidence shows that complaints had been received by the Metropolitan Police Department of Washington, D. C., that homosexuals were in the habit of frequenting the men's room at the YMCA and, accordingly, detectives were assigned to keep the place under surveillance. Their practice was to enter into conversation with a suspicious person in order to determine whether he would make a proposition to perform a homosexual act, or for the police officer to make such proposition to the suspect in order to ascertain what the suspect's reaction and reply would be. In this instance, apparently, the second course was followed.

[2] It is not clear on what charge the plaintiff was actually arrested, since apparently no formal charge was placed against him. The arrest could not have been on a charge of soliciting an immoral act, because the solicitation originated from the officer. It may have been a charge of assault in that the plaintiff indecently touched the officer's body.

Subsequently, a Removal Selection Board appointed by the Secretary of the Army to review the records of commissioned officers determined that the plaintiff should be required to show cause for his retention on the active list. Accordingly, on July 3, 1961, a formal notice was issued to the plaintiff notifying him to that effect and enumerating the following reasons:

(a) an existence of homosexual tendencies;
(b) conduct unbecoming an officer.[3]

A Board of Inquiry, composed of two Major Generals and one Brigadier General, was then convened and met at Norfolk, Virginia on July 19 and 20, 1961, devoting two days to this matter. The transcript indicates that the proceedings were conducted patiently and thoroughly, and that full opportunity was accorded to the plaintiff, who was represented by military counsel, to present evidence not only concerning the specific facts involved in the case, but also regarding his military record and character. The evidence in behalf of the Army was presented by an official known as "Recorder". It was entirely documentary. As proof of the incident that took place at the YMCA in Washington, there was introduced a formal written statement contemporaneously prepared by the detective. Counsel for the plaintiff had requested that the latter be produced in person, in order that he might be subjected

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[3] The self-evident importance of eliminating homosexuals from the armed forces is emphasized by Army Regulations AR 635-89, Paragraph 2, a:

"Homosexual personnel irrespective of sex will not be permitted to serve in the Army in any capacity, and prompt separation of homosexuals, as defined in these regulations, is mandatory. Homosexuals are unfit for military service because their presence impairs the morale and discipline of the Army, and homosexuality is a manifestation of a severe personality defect which appreciably limits the ability of such individuals to function effectively in society."

to cross-examination. Efforts to obtain his presence were made by the Board, but proved unavailing because the Metropolitan Police Department declined to pay his expenses to Norfolk, and the Board lacked subpoena power. At the hearing, the plaintiff's counsel stated that his client was most appreciative of the efforts made to secure the attendance of the police officer. Actually, since there were no substantial discrepancies between the two narratives, and as the crucial question was what were the plaintiff's intention and mental operations in engaging in the encounter with the police officer, the presence of the latter could hardly have thrown very much light on this vital issue. The documentary evidence introduced by the Army further showed that on one occasion when stationed in the Pacific during the War, the plaintiff had been a passive victim of a momentary, unconsummated homosexual attempt on the part of another officer. This information was elicited from the plaintiff during exhaustive interviews with him after the incident in Washington.

An Army psychiatrist, who had examined the plaintiff in behalf of the Army, was called as a witness by the plaintiff. He expressed the view that the plaintiff was not a homosexual and recommended that that the plaintiff be retained in the Army, but also suggested that the plaintiff receive psychiatric out-patient treatment, preferably in a civilian facility. The plaintiff testified at length in his own behalf and was searchingly cross-examined. He maintained throughout that he had no intention to engage in any homosexual practice, but that he had participated in the conversation with the detective, thinking that the latter was a homosexual, merely to satisfy his curiosity as to how such persons reacted. He admitted that his conduct had been very foolish. Witnesses were called and documentary evidence submitted showing the high quality of the plaintiff's military record, and attesting to his good character and reputation.

The Board of Inquiry then made the following findings and recommendations:

"1. As to the allegation of existence of homosexual tendencies that cause for retention has not been shown. This finding is based on the following reason:

> The evidence presented by the respondent has not refuted nor rebutted the homosexual tendencies exhibited by the actions which took place in the YMCA, Washington, D.C., on the night of 21 September 1960.

"2. As to the allegation of conduct unbecoming an officer, that cause for retention has not been shown. This finding is based on the following reason:

> The actions of the respondent in permitting himself to be lured by a complete stranger into a latrine, and in that latrine acting in such a manner as to cause his arrest, are completely incompatible with the conduct expected of an officer.

"In view of such findings, the Board recommends:

"Elimination, and that a General Discharge, under Honorable Conditions, be issued."

This action came before a Board of Review, composed of a Major General and two Brigadier Generals, on October 24, 1961. Such a Board proceeds *ex parte* solely on the record before the Board of Inquiry, and neither the respondent nor his counsel appear or is heard. It made the following findings and recommendations:

> "The Army Board of Review for Eliminations, having reviewed the records of this case, in closed session and by secret written ballot, the majority of the member of the Board concurring, finds:
>
> That Lt. Col. J. B. Beard, 084450, AGC has failed to show cause why he should be retained in the Army.

RECOMMENDATION

"The Army Board of Review for Eliminations, in closed session and by secret written ballot, the majority of the members of the Board concurring, recommends that Lt. Col. J. B. Beard, 084450, AGC,

a. Be eliminated from the Army.

b. Be issued a General Discharge."

The matter was then transmitted to the Secretary of the Army for final action, and this suit followed. A temporary restraining order was issued enjoining the Secretary for the time being from separating the plaintiff from the service, and this order was continued until the determination of the pending motions by this Court.

We now reach a consideration of the sole issue to be determined by this Court, namely, the constitutionality of the statute under which the action of the Army separating the plaintiff from the active list, is being taken. This discussion must be based on two provisions of the Constitution.

Article II, Section 2, provides that:

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States; . . ."

Article I, Section 8, which contains an enumeration of the powers of Congress, in Clause 14, provides that the Congress shall have power

"To make Rules for the Government and Regulations of the land and naval Forces;"

An historical review of the usages of the executive and legislative branches of the Government in connection with the dismissal of Army and Naval officers, will show a continual practice and an unvarying understanding on the

part of the President and the Congress, that the two provisions of the Constitution comprize plenary discretionary power, not limited by any other clause of the Constitution, to dismiss officers from active service in the armed forces at will at any time. While continuous legislative and executive construction is not conclusive, nevertheless, it is entitled to great weight in interpreting the Constitution, especially if the practice is uninterrupted and has been acquiesced in for a long period beginning with the adoption of the fundamental instrument. *Springer* v. *United States*, 102 U. S. 586, 599; *The Laura*, 114 U. S. 411; *Field* v. *Clark*, 143 U. S. 649, 691; *Fairbank* v. *United States*, 181 U. S. 283. It seems useful and desirable, therefore, to make a brief chronological survey of the continuous practice in this field.

From the early days of the Republic until the Civil War, the President exercised the power to dismiss officers entirely in his discretion. It was deemed a part of his constitutional authority as Commander in Chief.

Winthrop in his classic treatise on *Military Law*, Vol. 1, 1056, 1057, discusses this question in the following manner:

> "The summary dismissal or discharge of officers of the army and navy has been, from the earliest period, a prerogative of the British sovereign . . . In this country, the power, having been employed by Congress antecedently to the adoption of the Constitution, was subsequently exercised by its successor in the executive department of the government, the President, from the period of the debate of 1789 on the subject, in the House of Representatives, down to the passage of the Act of 1866, ...
>
> • • • •
>
> "Prior to the late war, indeed, summary dismissals or discharges of officers of the army by the order of the President, though from time to time resorted to, were not frequent. But during the war—especially between July 1861 and October 1865—these dismissals and discharges were numerous; about one hundred and

> fifty, of officers of all grades, and for various causes, being published in the General Orders, and upwards of fifteen hundred in the Special Orders, of the War Department. In the great majority of cases, no trial or investigation by a military court had preceded the action taken."

Again, Winthrop states (p. 1066):—

> "It will appear from this review that the construction of the Constitution in favor of the executive power of removal, however doubtfully arrived at in the beginning, had, prior to the legislation of 1886, (incorporated in Art. 99) become firmly established by the acceptation and judgment of the legal authorities and the continued and unquestioned practice of the executive department."

In 1806 the Congress expressly recognized the power of the President to dismiss an officer in Article 11 of the Articles of War enacted on April 10, 1806, 2 Stat. 359, which contained the following clause:

> "neither shall a commissioned officer be discharged from the service, but by order of the President of the United States, or by sentence of a General Court Martial."

During the Civil War, by the Act of July 17, 1862, 12 Stat. 596, it was provided in Section 17—

> "That the President of the United States be, and hereby is, authorized and requested to dismiss and discharge from the military service either in the army, navy, marine corps, or volunteer force, in the United States service, any officer for any cause, which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote the public service."

The use of the word "request" may have some significance, as it is subject to the inference that the Congress considered that the President had inherent power in the matter, and was requesting him to exercise it under certain

circumstances. After the hostilities ceased, this provision was repealed by the Act of July 13, 1866, Section 5, 14 Stat. 92, and the following was substituted:

> ". . . no officer in the military service or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

Article 99 of the Articles of War, contained in the Revised Statutes of 1878, Section 1342, p. 239, reenacted in substance the above mentioned clause from Article 11 of the 1806 edition, and provided that

> ". . . no officer shall be discharged or dismissed from the service except by order of the President, or by sentence of a general court-martial."

It added the clause introduced in the Act of 1866 that

> ". . . in time of peace, no officer shall be dismissed except in pursuance of a sentence of court-marital, or in mitigation thereof."

The Act of October 1, 1890, Section 3, 26 Stat. 562, authorized the President to prescribe a system of examinations for all officers of the Army below the rank of major in order to determine their fitness for promotion. It further provided that any officer who failed in two successive examinations should be discharged.

Article 118 of the Articles of War of 1916, Act of August 29, 1916, 39 Stat. 650, 669, reenacted the former Article 99, to the effect that no officer should be discharged from the service except by order of the President or by sentence of a General Court-Martial; and in time of peace, except in pursuance of a sentence of a court-martial or in mitigation thereof.

The Army Reorganization Act of June 4, 1920, Section 24(b), 41 Stat. 773, established an administrative procedure for eliminating officers from the Army. Such officers were

classified in what was denominated as Class B. Before being placed in Class B, an officer was given an opportunity to appear before a court of inquiry. Its recommendations were forwarded to a Classification Board, which took final action that was not subject to further review, except upon the order of the President. An officer placed in Class B was either discharged or placed on the retired list, depending upon whether his unfitness was due to his own neglect, misconduct, or avoidable habits.

By the Act of June 29, 1948, Title I, Section 101, 62 Stat. 1081, the Secretary of the Army and the Secretary of the Air Force were directed to convene Selection Boards to review the records of all officers on the active list of the regular Army, or the regular Air Force, to determine which of them should be required to show cause why they should be retained. Such selection was to be based upon the officers' failure to achieve such standards of performance as the Secretary might prescribe. Every officer so named was to receive a hearing before a Board of Inquiry. An unfavorable recommendation of such a Board was to be submitted for consideration to a Board of Review. If the latter recommended dismissal, the matter was to be transmitted to the Secretary, whose action was to be final and conclusive.

The Uniform Code of Military Justice, which became law on May 5, 1950, 64 Stat. 146, reenacted Article 118 of the Articles of War, 50 U. S. C. §739, (now 10 U.S.C. §1161).

On August 10, 1956, the statute invoked in this case became law. 10 U.S.C. §§ 3781 *et seq.* 70A Stat. 218. It was amended and expanded on July 12, 1960, 74 Stat. 386, and has been previously summarized.

The conclusion is inescapable that it was the continuous, uninterrupted, accepted understanding and practice from the adoption of the Constitution that an officer of the armed forces was subject to removal at any time by the President

in his discretion, except as such discretion was limited by an Act of Congress; and further, that Congress might establish a procedure for the elimination of officers, who either are surplus, or not regarded as meeting the high standards that should be exacted from officers. Such a procedure is not subject to the limitations of the due process clause, or any other Constitutional provision.

Obviously, it is indispensable that the morale and efficiency of the armed forces be maintained at all times on the highest possible level, and that in order to attain this aim an excellent quality of performance, character and conduct must be exacted from officers. The safety of the nation may depend upon the nature of its armed forces and the leadership of their officers. High standards among the personnel of the armed forces are indispensable in the interests of national defense. They cannot be secured by the courts. Insofar as possible the Commander in Chief and the officers acting under him, must be left untrammelled and unfettered to keep the armed forces on a high level at all times.

Armies cannot be maintained and commanded, and wars cannot be won by the judicial process. Supervision and control over the selection, appointment and dismissal of officers are not judicial functions. Dismissals of officers are not limited or controlled by the Bill of Rights.

The decisions of the Supreme Court have throughout our history recognized the inherent power to dismiss officers of the armed forces and have sustained statutory provisions creating an administrative routine to attain this result. No case has been cited holding any such statute repugnant to the Constitution and independent research has disclosed none.

Thus, in *McElroy v. United States*, 102 U. S. 426, 437, the Supreme Court, in an opinion by Mr. Justice Harlan, held that under the Act of 1862, the President had the power to dismiss an officer from the service summarily,

In *Blake* v. *United States*, 103 U. S. 227, 231, in an opinion again rendered by Mr. Justice Harlan, it was stated:

> "From the organization of the government, under the present Constitution, to the commencement of the recent war for the suppression of the rebellion, the power of the President, in an absence of statutory regulations, to dismiss from the service an officer of the army or navy, was not questioned in any adjudged case, or by any department of the government."

If unbridled and unlimited power to dismiss officers is inherent in the President unless limited by Acts of Congress, it follows *a fortiori* that such statutory restrictions and administrative procedure as may be imposed or created by Congress, are not subject to the limitations of the Bill of Rights or any other constitutional provisions.

In *Reaves* v. *Ainsworth*, 219 U. S. 296, the Court sustained the Act of 1890 above mentioned, under which an army officer was to be discharged from the service if he failed to pass two successive examinations for promotion. The Court observed (p. 302) that in that case the examining board had refused to call witnesses as to the officer's physical condition on the ground that the physicians named had already filed certificates. The Court further noted that the Board did not even allow the officer to call witnesses, to inspect exhibits presented to the Board, or to cross-examine the surgeons as to their reports. The Supreme Court found no basis for criticizing this procedure. In summarizing its views the Court made the following penetrating observations (p. 306):

> "*The courts are not the only instrumentalities of government. They cannot command or regulate the army.* To be promoted or to be retired may be the right of an officer, the value to him of his commission, but greater even than that is the welfare of the country, and, it may be, even its safety, through the efficiency of the army. . . . If it had been the intention of

> Congress to give to an officer the right to raise issues and controversies with the board upon the elements, physical and mental, of his qualifications for promotion and carry them over the head of the President to the courts, and there litigated, it may be, through a course of years, upon the assertion of error or injustice in the board's rulings or decisions, such intention would have been explicitly declared. The embarrassment of such a right to the service, indeed the detriment of it, may be imagined." (Emphasis supplied.)

In *Wallace* v. *United States*, 257 U. S. 541, 544, Mr. Chief Justice Taft made the following comments:

> "Before the Civil War there was no restriction upon the President's power to remove an officer of the Army or Navy. The principle that the power of removal was incident to the power of appointment was early determined by the Senate to involve the conclusion that, at least in absence of restrictive legislation, the President, though he could not appoint without the consent of the Senate, could remove without such consent in the case of any officer whose tenure was not fixed by the Constitution."

In *French* v. *Weeks*, 259 U. S. 326, 327-328, the Supreme Court sustained the validity of the Act of June 4, 1920, which, as stated above, provided for a classification of all officers in Class A and Class B, the latter not to be retained in the service.

In *Crowell* v. *Weeks*, 259 U. S. 336, 343, decided on the same day, Mr. Justice Clarke wrote as follows:

> "The power given to Congress by the Constitution to raise and equip armies and to make regulations for the government of the land and naval forces of the country (Art. I, 8) is as plenary and specific as that given for the organization and conduct of civil affairs; . . . . It is difficult to imagine any process of government more distinctively administrative in its nature and less adapted to be dealt with by the processes of civil courts than the classification and reduc-

tion in number of the officers of the Army. . . n its nature it belongs to the executive and not to the judicial branch of the Government."

The specific objections advanced by the plaintiff against the validity of the present statute can be disposed of briefly. The first criticism is that it places the burden of proof on the officer instead of on the Government. Bearing in mind that the purpose of the statute is not to provide for trial of officers on specific charges, but to create an administrative machinery and routine for eliminating officers who do not meet the required standards, there is no constitutional objection to placing the burden of proof where it is deemed appropriate to do so in the interests of the public welfare. The essence of the statute is that if a doubt arises whether a particular officer should be retained in the service, he has the onus of convincing his superiors that he should not be eliminated. No constitutional objections to this provision is discernible.

The second objection is that there is no provision for confronting the officer with witnesses against him. The constitutional provision for confrontation is a vital feature of the Bill of Rights. It is intended, however, for trials in the criminal courts and is a safeguard in the administration of the criminal law. It does not necessarily have an essential function in other activities of Government. For example, the Civil Service Act, 5 U.S.C. §652, provides that a civil service employee shall not be dismissed except on charges. It not only fails to provide for confrontation with witnesses, but it does not even accord a hearing to the employee. It requires merely that the employee be given notice of the charges and an opportunity to file a written reply. The validity of this provision is unquestioned and has been consistently applied and judicially approved since its enactment in 1912.[4]

[4] *Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 256 *et seq.* affirmed by equally divided Court, 341 U. S. 918.

In *Williams* v. *Zuckert*, decided by the United States Court of Appeals for the District of Columbia Circuit, on November 9, 1961 (not yet reported), it was held that a civilian employee of the Government who has veterans' preference is not entitled to the production of witnesses for cross-examination, in a case in which affidavits were the basis of charges against him. The Court called attention to the fact that statutes authorizing the dismissal of civilian employees by an administrative process, do not require the Government to produce for cross-examination the persons whose affidavits or statements supply the factual basis for dismissal. No reason is perceived why these remarks are not equally applicable to the statute here under consideration. The necessary inference from the opinion in *Williams* v. *Zuckert*, is that there is no constitutional infirmity in the statute because of that circumstance.

The Court, therefore, concludes that the statute under consideration is not repugnant to the Constitution.

The cases on which the plaintiff relies are distinguishable. *Greene* v. *McElroy*, 360 U. S. 474, did not involve members of the armed forces, but concerned a civilian employee of a Government contractor. He was dismissed by the latter because the Government denied him clearance to security information, and the employer was unable to use him on work of other types. The case does not bear on the rights of the Government as against officers of the armed forces. Moreover, the effect of this case has been considerably narrowed by *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, in which it was held that an employee of a concessionnaire on a military or naval installation could be summarily deprived of right of access to the area.

Bland v. *Connally*, 293 F. 2d 852, and *Davis* v. *Stahr*, 293 F. 2d 860, likewise did not deal with active personnel of the armed forces, but concerned inactive reservists. The decisions were based on the proposition that Congress had

not authorized the Secretary of the Navy to issue a discharge to inactive reservists under conditions less than honorable. No constitutional question was determined.

Harmon v. *Brucker*, 355 U. S. 579, held that neither statutes nor regulations authorized the Secretary of the Army to issue discharges to soldiers in form other than honorable because of pre-induction activities. It did not involve any constitutional question.

In conclusion the Court may well refer to the famous remarks made by Mr. Chief Justice Taney, over a century ago, in *Decatur* v. *Paulding*, 14 Pet. 497, 516:

> "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

Accordingly, the motion of the defendants for summary judgment will be granted, and the plaintiff's cross-motion denied, the motion for a preliminary injunction will be denied, and the temporary restraining order vacated.[5] Counsel may submit an appropriate order.

/s/ WALTER M. BASTIAN
United States Circuit Judge.

/s/ DAVID A. PINE
United States District Judge.

/s/ ALEXANDER HOLTZOFF
United States District Judge.

December 15, 1961.

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[5] In view of the conclusion being reached, it is unnecessary to discuss the procedural objection interposed by the Government, that the plaintiff's action was prematurely brought in that he failed to exhaust his administrative remedies. In this connection, see *Ogden* v. *Zuckert*, decided by the Court of Appeals, D. C. Circuit, December 14, 1961.

APPENDIX B

JUDGMENT BELOW

[Caption Omitted]

ORDER

This cause came on for hearing on plaintiff's Motion For A Preliminary Injunction and defendants' opposition thereto and, further, on defendants' Motion To Dismiss and Alternative Motion For Summary Judgment and plaintiff's Cross-Motion For Summary Judgment. Upon consideration of the complaint, exhibits, and affidavits, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motions, and after hearing oral argument in open Court on behalf of the respective parties, and it appearing to the Court that there is no genuine issue of material fact, and the Court having filed an opinion herein which shall constitute findings of fact and conclusions of law, it is by the Court on this 19 day of December, 1961,

Ordered that defendants' motion for summary judgment be and the same is hereby granted and the complaint be and the same is hereby dismissed, and it is

Further Ordered that plaintiff's cross-motion for summary judgment be and the same is hereby denied, and it is

Further Ordered that defendants' alternative motion to dismiss be and the same is hereby denied as moot, and it is

Further Ordered that plaintiff's motion for a preliminary injunction be and the same is hereby denied, and it is

Further Ordered that the temporary restraining order be and the same is hereby vacated.

/s/ Walter M. Bastian
United States Circuit Judge

/s/ David A. Pine
United States District Judge

/s/ Alexander Holtzoff
United States District Judge

APPENDIX C

STATUTE INVOLVED

The present appeal concerns the following portions of Title 10, U.S. Code, as added by Section 3(a) of the Act of July 12, 1960, Pub. L. 86-616, 74 Stat. 386, 388:

CHAPTER 360.—SEPARATION FROM REGULAR ARMY FOR MORAL OR PROFESSIONAL DERELICTION OR IN INTERESTS OF NATIONAL SECURITY

§ 3791. Selection boards: composition; duties

The Secretary of the Army may at any time convene a board of general officers to review the record of any commissioned officer on the active list of the Regular Army to determine whether he shall be required, because of moral dereliction, professional dereliction, or because his retention is not clearly consistent with the interests of national security, to show cause for his retention on the active list.

§ 3792. Boards of inquiry: composition; duties

(a) Boards of inquiry, each composed of three or more general officers, shall be convened at such places as the Secretary of the Army may prescribe, to receive evidence and make findings and recommendations whether an officer, required to show cause under section 3791 of this title, shall be retained on the active list of the Regular Army.

(b) A fair and impartial hearing before a board of inquiry shall be given to each officer so required to show cause for retention.

(c) If a board of inquiry determines that the officer has failed to establish that he should be retained on the active list, it shall send the record of its proceedings to a board of review.

(d) If a board of inquiry determines that the officer has established that he should be retained on the active list,

his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

§ 3793. Boards of review: composition; duties

(a) Boards of review, each composed of three or more general officers, shall be convened by the Secretary of the Army, at such times as he may prescribe, to review the records of cases of officers recommended by boards of inquiry for removal from the active list of the Regular Army under section 3792 of this title.

(b) If, after reviewing the record of the case, a board of review determines that the officer has failed to establish that he should be retained on the active list, it shall send its recommendation to the Secretary for his action.

(c) If, after reviewing the record of the case, a board of review determines that the officer has established that he should be retained on the active list, his case is closed. However, at any future time, he may be again required to show cause for retention under section 3791 of this title.

§ 3794. Removal of officer: action by Secretary of the Army upon recommendation

The Secretary of the Army may remove an officer from the active list of the Regular Army if his removal is recommended by a board of review under this chapter. The Secretary's action in such a case is final and conclusive.

§ 3795. Rights and procedures

Each officer under consideration for removal from the active list of the Regular Army under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a board of inquiry, for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Army, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

§ 3796. Officers considered for removal: retirement or discharge

(a) At any time during proceedings under this chapter and before the removal of an officer from the active list of the Regular Army, the Secretary of the Army may grant his request—

(1) for voluntary retirement, if he is otherwise qualified therefor; or

(2) for discharge under subsection (b).

(b) Each officer removed from the active list of the Regular Army under this chapter shall—

(1) if on the date of removal he is eligible for voluntary retirement under any law, be retired in the grade and with the pay for which he would be eligible if retired at his request; or

(2) if on that date he is ineligible for voluntary retirement under any law, be discharged in the grade

then held with severance pay computed by multiplying his years of active commissioned service, but not more than 12, by one month's basic pay of that grade.

(c) For the purposes of subsection (b)(2), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded.

§ 3797. Officers eligible to serve on boards

(a) No officer may serve on a board under this chapter unless he is senior in regular grade to, and outranks, any officer considered by that board.

(b) No person may be a member of more than one board convened under this chapter for the same officer.